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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

5 NICHOLAS SHAFFER,

6 Petitioner,

7 v.

8 JEFFREY A UTTECHT,

9 Respondent.

Case No. C19-5981-BHS-TLF

ORDER TO SHOW CAUSE

10 Petitioner, Nicholas Shaffer, who is proceeding *pro se*, filed a Petition for Writ of
11 Habeas Corpus pursuant to 28 U.S.C. § 2254. Dkt. 3. Petitioner challenges his
12 September 11, 2018, conviction and sentence for three counts of First Degree Child
13 Molestation. *Id.* The petition has not been served on respondent.

14 Under Rule 4 of the rules governing § 2254 petitions, the Court must promptly
15 examine a habeas petition when it is filed, and if it plainly appears from the petition and
16 its attachments the petitioner is not entitled to relief, the Court must dismiss the petition.

17 The Court concludes that petitioner's federal habeas petition—on its face—is
18 subject to dismissal as unexhausted. The Court notes that it appears petitioner may
19 also be procedurally defaulted. In his petition, petitioner contends his federal
20 constitutional rights were violated under the Fifth and Thirteenth Amendment because
21 he was not charged by Grand Jury Indictment. Dkt. 3, at 5-12. Petitioner indicates that
22 he has not raised the grounds for relief raised in the instant petition in state court either
23 on direct appeal or on a petition for collateral relief. Dkt. 3, at 1-15. He indicates he does
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1 not intend to bring his claims to the state courts—state courts would never have the
2 opportunity to consider the habeas claims raised in his federal petition; he asserts that
3 the state courts lack jurisdiction over issues that are raised under the United States
4 Constitution.¹ Dkt. 1, at 5-12. However, the exhaustion of state court remedies is a
5 prerequisite to granting a petition for writ of habeas corpus. See 28 U.S.C. § 2254(b)(1).

6 Furthermore, because it appears to have been more than a year since
7 petitioner’s judgment and sentence became final, petitioner’s habeas claims may now
8 be procedurally defaulted in the Washington state courts, and if he attempts to present
9 them in a state court challenge at this time, it appears the claims would be denied. The
10 Court therefore orders the petitioner to show cause why the Court should not dismiss
11 this federal habeas corpus petition as unexhausted and procedurally defaulted.

12 DISCUSSION

13 A state prisoner is required to exhaust all state court remedies, by fairly presenting
14 claims of violation of federal rights before the state courts, before seeking a writ of habeas
15 corpus. 28 U.S.C. § 2254(b)(1). The exhaustion requirement is a matter of comity,
16 intended to afford the state courts the “initial opportunity to pass upon and correct alleged
17 violations of its prisoners’ federal rights.” *Picard v. Connor*, 404 U.S. 270, 275 (1971)
18 (emphasis added). This is appropriate, because “state courts, like federal courts, are
19 obliged to enforce federal law.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). To
20 exhaust their federal claims, a would-be habeas petitioner must finish “one complete

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22 ¹ The Court notes that in the box labeled item 13(a) of the petition the petitioner checked “yes” in
23 response to the question of whether all grounds for relief raised in the petition have been presented to the
24 highest state court having jurisdiction. Dkt. 1, at 33. The Court interprets this as a typographical or
25 scrivener’s error, because petitioner makes clear in his explanation to the question that “**no grounds
herein have been raised at the state level**, as the state has no jurisdictional authority over federal
constitutional matters.” *Id.* (emphasis added).

1 round of the State's established appellate review process," up to the highest state court
2 with powers of discretionary review. *Id.*, 845.

3 A federal court must dismiss a federal habeas corpus petition if its claims are
4 unexhausted. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). This Court has the *sua*
5 *sponte* authority to examine the question of exhaustion at this stage of review. *Campbell*
6 *v. Crist*, 647 F.2d 956, 957 (9th Cir. 1981) ("This court may consider whether state
7 remedies have been exhausted even if the state does not raise the issue").

8 Petitioner must raise the grounds for relief contained in his habeas petition to the
9 Washington Court of Appeals and Washington Supreme Court. Petitioner contends he
10 has not presented his grounds for relief to the state courts because the state courts lack
11 the "jurisdictional authority to decide on United States Constitution matters, which are
12 outside of its jurisdictional or statutory governing limits." Dkt. 3, at 6-12. This argument
13 fails, because 28 U.S.C. § 2254(b)(1) recognizes the jurisdiction of state courts to
14 adjudicate constitutional issues. Federal habeas relief is available to address where the
15 state court's adjudication was "contrary to, or an unreasonable application of, clearly
16 established federal law, as determined by the Supreme Court of the United States." 28
17 U.S.C. § 2254(d)(1).

18 As the petition states, petitioner has not properly exhausted his claims for relief in
19 the state courts. Petitioner acknowledges he has not presented the claims raised in his
20 petition to the highest state court and thus it would appear his petition is not eligible for
21 federal habeas review. Dkt. 3, at 5-12.

22 In addition, because it appears to have been more than one year since the
23 judgment and sentence became final, it appears that petitioner's habeas claims may be
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1 procedurally defaulted in the courts of Washington State and if he attempts to present
2 them in a state court challenge at this time, his claims would be denied. According to
3 RCW 10.73.090, any collateral challenges to a conviction or sentence (for example, a
4 personal restraint petition or state habeas corpus petition) are barred if the collateral
5 challenge is filed after the judgment and sentence becomes final and the one-year
6 statute of limitations runs out. Thus, petitioner's claims would not be cognizable in
7 federal court and must be dismissed absent a showing of cause and prejudice or actual
8 innocence.

9 Unless it would result in a "fundamental miscarriage of justice," a petitioner who
10 procedurally defaults in state court may receive review of the defaulted claims only if he
11 demonstrates to the federal habeas court "cause" for his procedural default and "actual
12 prejudice" stemming from the alleged errors. *Coleman v. Thompson*, 501 U.S. at 750.
13 The petitioner must show an objective factor actually caused the failure to properly
14 exhaust a claim. Interference by state officials, the unavailability of the legal or factual
15 basis for a claim, or constitutionally ineffective assistance of counsel may constitute
16 cause. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A petitioner's own inadequacies are
17 not sufficient cause to excuse a procedural default. *Hughes v. Idaho State Bd. of*
18 *Corrections*, 800 F.2d 905, 907-09 (9th Cir. 1986); *Thomas v. Lewis*, 945 F.2d 1119 (9th
19 Cir. 1991).

20 "[I]n an extraordinary case, where a constitutional violation has probably resulted
21 in the conviction of one who is actually innocent, a federal habeas court may grant the
22 writ even in the absence of a showing of cause for the procedural default." *Wood v.*
23 *Hall*, 130 F.3d 373, 379 (9th Cir. 1997) (quoting *Murray v. Carrier*, 477 U.S. at 496). "To
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1 meet this manifest injustice exception, [the petitioner] must demonstrate more than that
2 'a reasonable doubt exists in the light of the new evidence.'" *Wood*, 130 F.3d at 379
3 (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)). "[T]he petitioner must show that it is
4 more likely than not that no reasonable juror would have convicted him in the light of the
5 new evidence." *Schlup*, 513 U.S. at 327. "[T]he miscarriage of justice exception is
6 concerned with actual as compared to legal innocence." *Calderon v. Thompson*, 523
7 U.S. 538, 559 (1998) (citation omitted).

8 Therefore, petitioner must demonstrate cause (such as an objective external
9 factor outside his control that excused his procedural default) and prejudice (an error of
10 constitutional proportions that infected his whole trial), or evidence of actual innocence.
11 If he cannot do so, his federal claims are not cognizable in this Court and are subject to
12 dismissal with prejudice.

13 ORDER

14 Based on the foregoing discussion, the Court finds that this petition appears to
15 be unexhausted, procedurally defaulted and barred by the statute of limitations.

16 The Court **orders the petitioner to show cause** in writing why the petition
17 should not be dismissed on this basis. Petitioner must show cause by **April 6, 2020**.
18 The failure to file a timely response or to adequately respond to the issues raised herein
19 may result in the dismissal of this matter with prejudice. The Clerk is directed to provide
20 copies of this order to petitioner.

21 Dated this 4th day of March, 2020.

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23 Theresa L. Fricke
24 United States Magistrate Judge
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